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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER T. GARRETT, Defendant and Appellant.	B203202 (Los Angeles County Super. Ct. No. KA076662)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Modified in part; affirmed in part.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnsen and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Christopher Garrett was convicted, following a jury trial, of one count of first degree murder in violation of Penal Code[1] section 187 and two counts of premeditated attempted murder in violation of sections 187 and 664. The jury found true the allegations that appellant personally and intentionally used and discharged a firearm causing great bodily injury or death in the commission of the murder and one of the attempted murders within the meaning of section 12022.53, subdivisions (b), (c), and (d) and personally and intentionally used and discharged a firearm in the commission of the second attempted murder within the meaning of section 12022.53, subdivisions (b) and (c). The jury also found true the allegations that all the offenses were committed for the benefit of a criminal street gang within the meaning of section 1866.22, subdivision (b)(1)(a). The trial court sentenced appellant to 50 years to life for the murder conviction plus 40 years to life on the count two attempted murder conviction and 21 years, eight months to life on the count three attempted murder conviction.

Appellant appeals from the judgment of conviction, making numerous claims of error. We order two additional $20 security fees imposed pursuant to section 1465.8, but affirm the judgment of conviction in all other respects.

Facts

On October 6, 2006, appellant, his roommate Todd Benson, and his cousin Michael met Vonda Fletcher at a McDonald's in Fontana. Appellant drove home with Benson, with Fletcher and Michael following in Fletcher's rented gray-blue Pontiac Grand Prix. From there, appellant and Fletcher drove in Fletcher's car to her grandmother's house in Pomona. According to Fletcher, appellant was wearing a long-sleeved polo shirt with vertical stripes.

At Fletcher's grandmother's house, appellant and Fletcher smoked marijuana and drank alcohol outside in the driveway among a group of around 10 to 13 people, mostly

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

relatives. At some point, appellant and someone else took Fletcher's car to get gas. When appellant had not returned after about 20 minutes, Fletcher became worried. Her cousin Amber Chisholm called appellant and told appellant to bring Fletcher's car back. He did.

About 11:00 p.m., Demetrics Eldridge was on Densmore Street in Pomona, talking with Jay Charon and Lamarr Brown. Charon and Brown were members of the Neckland Crips gang, which claimed turf in Pomona. Eldridge was not a gang member. A gray Grand Prix drove onto their street and stopped in front of the three men.

A red light-beam shone out the car's window, pointed at Brown and Eldridge. Eldridge and Brown were standing next to each other. Charon stood slightly apart to speak on his cell phone. Brown stated that he saw a red light coming from the car window straight at himself and Eldridge. Eldridge described the beam of red light as coming at him. There was a buzzing sound, then six to ten gunshots. According to Eldridge, the first or second shot hit a bottle in his hand and broke it. Brown then pushed Eldridge out of the way and took cover. Charon, who had been standing at the front of the car, was hit in the jugular vein by a bullet and died. Brown was hit in the arm and back by bullets.

Brown could not identify anyone in the car, nor could he tell the number of people inside, but recalled that the driver wore a red, white, and gray striped long sleeved shirt. Eldridge could not identify the driver but could tell he was dark-skinned, like appellant, and wore a long sleeved shirt that was light in color.

Meanwhile, at Fletcher's grandmother's house, Chisholm decided to move Fletcher's Grand Prix so that the grandmother could go out. As she drove the Grand Prix down the street, a green Malibu with three African American persons in it, stopped by Chisholm. Someone in the car yelled something like, "What happened to those guys that you dropped off." Chisholm drove away. The occupants of the Malibu then asked Devonne, a young boy in the neighborhood who was walking down the street towards Fletcher's grandmother's house, "Are you from 456?" and "Are you from the Islands?" and pointed a gun at him. Devonne ran away. The green car did not follow him.

The green Malibu drove down the street and made a left turn. Chisholm parked the Grand Prix in the driveway and yelled at appellant, "What did you do in my cousin's car?" Fletcher grabbed the car keys and got in the car with her cousin Curtis Truly. Appellant and another man got in the car also. Fletcher drove down the alley because she believed the men in the green Malibu would start shooting. She also wanted to check on Devonne.

The green Malibu came toward Fletcher's car at high speed with its headlights off. Fletcher backed out of the alley and onto the street. The green Malibu followed. The Malibu's occupants drew guns and fired. Fletcher drove away. Fletcher told police that appellant fired back at the Malibu. Fletcher was able to get away from the Malibu. She took appellant and Truly to their homes, then returned to her own home in San Bernardino. This shooting took place about 11:20 p.m.

According to Benson, appellant came home around midnight or one in the morning, tired and quiet as if he had experienced an eventful day. Benson later described appellant's demeanor as "amped up" or "excited." Appellant showed Benson something that looked like a clip from a semiautomatic gun.

The next day, Fletcher and Michael drove to Pomona and met appellant and Benson. Appellant asked what had happened the previous evening. Fletcher said she had been shot at. Appellant asked why Fletcher had not "switch[ed] the car when she had the chance." She said she did not have the money. Appellant offered to help. The police arrested appellant and Fletcher.

A nine millimeter shell casing and a .40 caliber shell casing were recovered from the scene of the first shooting on Densmore. Eight .40 caliber shell casings and five .9 millimeter Luger Winchester shell casings were recovered from the scene of the second shooting. A firearms expert examined the shell casings and determined that the nine millimeter casings found at the scene of the second shooting were fired from the same gun that fired the nine millimeter casing at the first shooting. Similarly, the .40 caliber casings from the two scenes were fired from the same gun.

A fully functional magazine for a nine millimeter Ruger handgun, a "Ruger P89," was recovered from appellant's parents' home. Benson had previously seen appellant with two handguns, one .40 caliber and the other a Luger P89 nine millimeter firearm. The Luger was equipped with a laser sight that emitted a red beam. A month or two before the instant shooting, appellant and Benson were pulled over in Ontario, and appellant was permitted to remove his belongings from the car, which included the two firearms.

Pomona Police Detective Richard Shope interviewed Fletcher. She said that as she drove away in her car, she was fired upon by rival gang members in a green car and appellant, wearing a vertical striped Polo shirt, returned fire. Appellant's thumb print was recovered from the Grand Prix, from the left rear passenger door. Detective Gregg Guenther too interviewed Fletcher, who clarified that no one in the car except appellant returned fire. Detective Guenther also interviewed Lamarr Brown, who said he had been "tight" with appellant in high school, but their friendship ended when each joined rival gangs. Brown said he associated with the Neckland Crips, and appellant with the 456 Island Bloods.

Pomona Police Detective Greg Freeman, a gang expert, testified that the 456 Islands gang was a Blood gang, and were rivals of the Neckland Crips. Islands members would go into Neckland territory to commit crimes to gain respect. Committing crimes in rival territory would cause retaliation. The Islands' primary activities included graffiti, robberies, witness intimidations, carjackings, murder, attempted murder on police officers, and the sale of narcotics.

In Detective Freeman's opinion, appellant was a member of the 456 Islands gang. His opinion was based on statements by Benson, Truly and Brown. A photograph depicted appellant and other Island members, wearing red and black, appellant throwing a gang sign. The photo was significant in that it showed appellant as a soldier for the Islands gang. Other photographs depicted appellant as an Islands member.

On the night of October 6, 2006, when Detective Freeman heard the call about the first shooting, he went to Pomona Valley Hospital. Jason Green, who belonged to the

Crips gang which associated with the Neckland Crips, was there. There were bullet holes in his green Malibu.

Detective Freeman noted that the second shooting occurred within around 20 minutes of the first. The fact the green car circled around before the second shooting implied that the first gunman had been identified and the victims were looking for him. Hypothetically, the shooting of Tony Flintland "was done for the benefit and association, at the direction of the criminal street gang, in this case the Necklands." Hypothetically, the shooting incident involving Brown, Eldridge, and Charon was also gang related.

To show that the 456 Island Bloods engaged in a pattern of criminal activity, the People offered minute orders showing convictions of Alexander Post on August 1, 2005 and of Shermaine Omar Thompson on August 29, 2006. In Detective Freeman's opinion, Post and Thompson were members of the 456 Island Bloods gang when they committed those crimes.

Appellant presented the testimony of Patricia Fant, a forensic firearms examiner, who testified that at least two different semiautomatic firearms were used in the shootings in this case because both nine millimeter and .40 caliber shells were recovered. One of the investigating officers in this case acknowledged that no gang paraphernalia was found in the search of appellant's parents' home.

Discussion

1. Gang evidence

Appellant contends that the trial court erred in admitting minute orders to prove the predicate gang offenses for the gang allegation and the testimony of Detective Freeman that appellant, Post, and Thompson are members of the 456 Islands gang. He claims that this evidence was hearsay or based on hearsay, so that its admission violated *Crawford* v. *Washington* (2004) 541 U.S. 36.

Appellant did not object that the admission of this expert testimony violated his federal constitutional rights. Thus, this claim has been forfeited. (*People* v. *Lewis* (2006) 39 Cal.4th 970, 1028, fn. 19; Evid. Code, § 353.) Appellant's trial took place in 2007.

Crawford was decided in 2004. We see no basis to excuse appellant from the general rule of forfeiture. (See *People* v. *Thomas* (2005) 130 Cal.App.4th 1202, 1208.) Even if this claim were not forfeited, we would see no violation of the Confrontation Clause.

It is well-established in California law that an expert witness may base his opinion "on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible" so long as the material is of a type that may reasonably be relied on by an expert in forming an opinion on the subject at hand. (Evid. Code, § 801, subd. (b); *People* v. *Gardeley* (1996) 14 Cal.4th 605, 618.) Gang experts may reasonably rely on conversations with gang members, personal investigations of crimes committed by gang members and information from colleagues and various law enforcement agencies. (*People* v. *Gardeley, supra,* 14 Cal.4th at pp. 619-620.)

"[B]ecause Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]" (*People* v. *Gardeley, supra,* 14 Cal.4th at p. 618.) "[A] witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact." (*Id*. at p. 619.)

As appellant acknowledges, the Fourth District Court of Appeal has considered a claim that *Crawford* barred an expert witness from testifying that the defendant belonged to a gang and committed the charged offense for the benefit of the gang. (*People* v. *Thomas, supra,* 130 Cal.App.4th 1202.) The Court held that, "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the Confrontation Clause 'does not bar the

use of testimonial statements for purposes other than establishing the truth of the matter asserted.' (*Crawford, supra,* 541 U.S. at p. 59, fn. 9, 124 S.Ct. at p. 1369, fn. 9, citing *Tennessee* v. *Street* (1985) 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425.)" (*People* v. *Thomas, supra,* 130 Cal.App.4th at p. 1210.)

Our colleagues in Division Six of this District Court of Appeal have concluded that the testimony of a gang expert about predicate gang offenses did not violate the Confrontation Clause. (*People* v. *Ramirez* (2007) 153 Cal.App.4th 1422.) In doing so, they rejected the claim, also made by appellant in this case, that the expert's testimony about the facts of the predicate offenses, unlike testimony about gang membership in *Thomas,* was offered for its truth and so violated the Confrontation Clause. The Court explained that "any expert's opinion is only as good as the truthfulness of the information on which it is based. Thus in *Thomas,* the expert's opinion that the defendant is a member of a gang has value only if the jury believes the hearsay on which the expert relied. Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*Id*. at p. 1427.)

Our colleagues in Division Two of this District Court of Appeal have reached the same conclusion as the Court in *Thomas* and *Ramirez* regarding testimony by a medical expert whose opinion was based in part on interviews with the victim conducted in anticipation of the trial. (*People* v. *Cooper* (2007) 148 Cal.App.4th 731.) We agree with the reasoning and holding of *Thomas, Ramirez,* and *Cooper*.

Appellant also contends that the minute orders showing guilty pleas in the two prior gang cases was inadmissible under the Confrontation Clause because the underlying pleas reflected in those orders were testimonial hearsay.[2] We do not agree.

As the California Supreme Court has explained, "the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-

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[2] To the extent that appellant argues that the records themselves are hearsay regardless of their content and their admission violates the Confrontation Clause, appellant is mistaken. (*People* v. *Taulton* (2005) 129 Cal.App.4th 1218, 1224-1225.)

court analogs, in purpose and form, of the testimony given by witnesses at trial." (*People* v. *Cage* (2007) 40 Cal.4th 965, 984.) Thus, "the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony-to establish or prove some past fact for possible use in a criminal trial. . . . [T]he primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation." (*Ibid*.)

Here, Post and Thompson almost certainly made their guilty pleas in order to obtain a more favorable sentence, or the possibility of a more favorable sentence. The prosecutor elicited and the trial court accepted the pleas for purpose of judicial economy. It is not objectively reasonable to view the pleas as obtained or given primarily for use in another criminal trial. Thus, the pleas are not testimonial hearsay.

2. Sufficiency of the evidence – gang allegation

Appellant contends that there is insufficient evidence to support the gang enhancement. He claims that the People were required to prove the date that prior criminal conduct by gang members occurred, but proved only the date of conviction for the conduct. We do not agree.

Section 186.22 applies to any defendant who "actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (a).) Pattern of criminal gang activity "means the commission of, attempted commission of, conspiracy to commit, or solicitation of, *sustained juvenile petition for, or conviction of* two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e) (italics added).) Subdivision (e) was amended in 1996 to add the italicized language.

Appellant contends that the reference to convictions in subdivision (e) is only intended to permit proof of the underlying conduct by showing a conviction rather than

requiring witnesses to testify, but that the date of the offense must still be proved. We do not agree.

We agree with our colleagues in Division Three of this District Court of Appeal that subdivision (e) "plainly indicates the Legislature's intent that the section 186.22 predicate offenses may be proved by a showing of the fact of the convictions, rather than proof of the underlying conduct, if the People so choose." (*People* v. *Duran* (2002) 97 Cal.App.4th 1448, 1461, fn. 5.) As our colleagues point out, their conclusion is supported by "a summary prepared for an April 16, 1996 hearing before the Assembly Committee on Public Safety. That summary explained that the addition of the language to section 186.22 would '"make it more practical for prosecutors to apply the [Street Terrorism Enforcement and Prevention] Act by allowing the use of previous court records as proof of the predicate acts instead of requiring witnesses to the original crime to testify anew,'" in order to '"provide[] for a more efficient and expeditious delivery of justice to the victims of criminal street gang violence.'" (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 2035 (1995-1996 Reg. Sess.) Apr. 8, 1996, p. 2.)" (*People* v. *Duran, supra,* 97 Cal.App.4th at p. 1461, fn. 5.)

Many, if not most, of the court records used to prove prior convictions contain only an imprecise date for the commission of the offense or no date at all. The abstract of judgment in this case shows only the year the offense was committed, for example. Minute orders of a prior conviction, as were offered in this case, do not show the date the offense was committed at all. Thus, in many cases, if the People were required to prove the date the offense was actually committed, they would have to call witnesses to the underlying crimes. This would defeat the purpose of the amendment.

The People proved that 456 Island gang members were convicted of two qualifying offenses within the requisite time period. That is sufficient evidence to support the true finding on the gang enhancement.

3. Gun evidence and second shooting evidence

Appellant contends that the trial court erred in admitting evidence that Benson saw him in possession of a Ruger nine millimeter handgun with a laser sight and a .40 caliber handgun about a month before the shooting. He also contends that the court erred in admitting evidence that he was involved in a second uncharged shooting shortly after the shooting at issue in this case. We see no error.

Appellant contends that the evidence was improper character evidence under Evidence Code section 1101, subdivision (a), which prohibits the use of evidence of a person's character, including evidence of specific instances of his conduct, to prove the person's conduct on a specified occasion, that is to show propensity to commit an act. We do not agree.

Subdivision (b) of Evidence Code section 1101 provides in pertinent part: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

It is well-established that the rule against character evidence does not bar the admission of evidence that the defendant possessed a gun that could have been used to commit the charged crime. This is so because if the gun in the defendant's possession might have been the gun used in the charged offense, evidence that the defendant possessed a gun "'was thus relevant and admissible as circumstantial evidence that he committed the charged offenses.' [Citation.]" (*People* v. *Cox* (2003) 30 Cal.4th 916, 956.) Our Supreme Court has explained the admissibility of gun possession evidence as follows: "'When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for

such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]'" (*People* v. *Cox*, *supra*, 30 Cal.4th at p. 956, quoting *People* v. *Riser* (1956) 47 Cal.2d 566, 577.)

Here the police found both .40 caliber and nine-millimeter Ruger cartridges at the scene of the shooting. Witnesses described a red light coming from the car before the shooting, suggesting a laser sight or scope. Thus, both weapons seen by Benson could well have been used in the shootings. The nine millimeter with the laser scope was the more distinctive weapon.

Appellant complains that Bensen's observation of the guns occurred more than a month before the shootings in this case. That alone does not reduce the significance of the evidence. (See *People* v. *Carpenter* (1999) 21 Cal.4th 1016, 1052 [court properly admitted evidence that defendant possessed gun that might have been the murder weapon in February 1981 after first killing in October 1980 and before last killing on March 29, 1981].) A laser-sighted nine millimeter is a distinctive weapon. Further, the link between appellant, the weapons and the shooting was strengthened by the post-shooting discovery of a magazine for the Ruger nine millimeter at appellant's parents' house.

The second shooting was not improper propensity evidence either. Fletcher offered direct evidence that appellant fired a nine millimeter handgun from her car. The nine millimeter casings found at the scene of the second shooting were fired from the same gun that fired the nine millimeter casings at the first shooting. This shooting occurred less than 25 minutes after the first shooting. This is direct evidence linking appellant to the first, charged shooting.

Evidence that is not barred by Evidence Code section 1101 may still be excluded under Evidence Code section 352. Appellant contends that that should have been the case here.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court has broad discretion to weigh the probative value of evidence against its potential prejudicial impact. A court's decision that the probative value of the evidence outweighs its prejudicial impact will not be disturbed on appeal unless the court exercised its discretion in "'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citations.]" (*People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

The "prejudice" referred to in Evidence Code section 352 applies to evidence that uniquely tends to evoke an emotional bias against one side, with very little effect on the issues. (*People* v. *Crittenden* (1994) 9 Cal.4th 83, 134.)

Here, the gun and second shooting evidence was quite relevant. It showed that appellant possessed a distinctive weapon before the charged shooting, and possessed the weapon used in the murders and attempted murders very shortly after they occurred. While there may be a slight prejudicial effect in linking a defendant to a gun, there was nothing particularly inflammatory about the gun evidence in this case. Benson reported seeing appellant with guns, but also stated that police let appellant remove the guns from his car. Appellant did fire the nine millimeter in the second shooting, but did so in what appeared to be self-defense; he was not charged with that shooting. Presentation of the gun and second shooting evidence was not time-consuming or confusing. Thus, the probative value of the evidence was not outweighed by its potential prejudicial impact. The trial court did not abuse its discretion in admitting the evidence.

4. Kill zone instructions

Appellant contends that the trial court erred in instructing the jury with CALJIC No. 8.66.1 on the "kill zone" theory of attempted murder.

CALJIC No. 8.66.1 provides: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's

vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' zone of risk is an issue to be decided by you."

This instruction is based on the holding of *People* v. *Bland* (2002) 28 Cal.4th 313. In that case, the Court noted when a person shoots at one person intending to kill him, but misses and kills another instead, the shooter can be convicted of murder under the transferred intent doctrine. The Court pointed out implied malice is sufficient for murder but that attempted murder requires the specific intent to kill, and concluded that the transferred intent doctrine of murder could not be applied to attempted murder. The Court did find that a person could be convicted of multiple counts of attempted murder when "the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity." (*Id.* at p. 329.)

Appellant contends that it was not reasonable to infer that he intended to kill Eldridge as part of a plan to kill Brown and Charon. Appellant notes that this was supposed to be a gang shooting, Charon and Brown were the only men actually hit by bullets and they were the only two gang members in the group.

We see ample evidence to support a kill zone instruction. Appellant, alone or with an accomplice, fired six to ten shots from two handguns at three men. The men were standing fairly close to each other. Eldridge and Brown were standing next to each other. Brown stated that he saw a red light coming from the car window straight at himself and Eldridge. Eldridge described the beam of red light as coming at him. According to Eldridge, the first or second shot hit a bottle in his hand and broke it. Brown then pushed Eldridge out of the way. The fact that appellant narrowly missed Eldridge does not negate an intent to kill him.

5. Use of "kill zone" term

Appellant contends that the use of the term "kill zone" is unnecessarily inflammatory and argumentative and so violated his right to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments.

A trial court should not give "an instruction that is argumentative, i.e., of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People* v. *Gordon* (1990) 50 Cal.3d 1223, 1276; *U.S.* v. *McCracken* (5th Cir. 1974) 488 F.2d 406, 414 [instructions must not be argumentative or slanted in favor of either side].)

Appellant points out that the instruction also uses the phrase "zone of risk" and claims that this phrase adequately describes the area in question. He contends that the phrase kill zone "strongly suggests an arcade-like shooting gallery in which all occupants are targets of a homicidal maniac" and that "implicit in the phrase itself is a strong inference that the defendant had the intent to kill all those within the zone of risk."

We agree with appellant that the term "zone of risk" is an adequate description of the area to be considered, and that the use of the term "kill zone" may be unnecessary. We do not agree that the phrase "kill zone" is inflammatory or suggests an arcade-like shooting gallery, however. We strongly disagree that the phrase itself creates an inference that the defendant intended to kill everyone in the zone of risk. The instruction considered as a whole reads more to the contrary: if the jury finds that the defendant intended to kill everyone in the zone of risk, that zone becomes the kill zone. Further, the California Supreme Court has used the term kill zone in describing the concept of concurrent attempt to kill. We are not inclined to fault an instruction which simply uses the language of that Court.

6. Lesser related offense

Appellant contends that the trial court erred in refusing his request for an instruction on the lesser related offense of assault with a deadly weapon, and that this request violated his right to trial by jury, compulsory process, due process and a fair trial under Sixth Amendment and Fourteenth Amendments.

As appellant acknowledges, the California Supreme Court has held the trial courts are not required to instruct on lesser related offenses without the prosecutor's consent. (*People* v. *Birks* (1998) 19 Cal.4th 108, 112-113.) In so holding, the Court noted that the

United States Supreme Court never suggested that defendant is entitled to instructions on lesser related offenses under the United States Constitution. (*Id*. at p. 124.) We are bound by the decisions of the California Supreme Court and so reject appellant's claim. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455; *People* v. *Martinez* (2002) 95 Cal.App.4th 581, 586.)

7. Mental state required for attempted murder

Appellant contends that CALJIC Nos. 8.10, 8.11 and 8.66, when given together, are likely to confuse the jury on the mental state required for murder. We do not agree.

CALJIC No. 8.10, as given, provided: "Every person who unlawfully kills a human being with malice aforethought is guilty of the crime of murder in violation of Penal Code § 187. [¶] A killing is unlawful, if it was neither not justified nor excusable. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The killing was done with malice aforethought."

CALJIC No. 8.11, as given, provided: "'Malice' may be either express or implied. [¶] Malice is express when there is manifested an intention unlawfully to kill a human being. [¶] Malice is implied when: [¶] 1. The killing resulted from an intentional act; [¶] 2. The natural consequences of the act are dangerous to human life; and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life."

CALJIC No. 8.66, as given, provided: "Every person who attempts to murder another human being is guilty of a violation of Penal Code §§ 664 and 187. [¶] Murder is the unlawful killing of a human being with malice aforethought. [¶] In order to prove attempted murder, each of the following elements must be proved; [¶] 1. A direct but ineffectual act was done by one person towards killing another human being; and [¶] 2. The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being."

Appellant contends that these instructions might have caused the jury to believe that it could convict appellant of attempted murder based on implied malice. His theory is that CALJIC No. 8.66 refers to murder as killing with "malice aforethought" and CALJIC No. 8.11 states that malice may be expressed or implied.

We see no possibility that the jury understood the instructions in the manner hypothesized by appellant. CALJIC No. 8.66 expressly told the jury that "express malice aforethought, namely, a specific intent to kill" is required for an attempted murder conviction. There would be no reason for the jury to disregard that instruction.

Appellant's reliance on *People* v. *Beck* (2005) 126 Cal.App.4th 518 is misplaced. In that case, the appellant was charged only with attempted murder, so CALJIC No. 8.11 was superfluous. More importantly, the prosecutor in *Beck* argued implied malice as a basis for an attempted murder. (*Id.* at pp. 521-525.) That was not the case here. Appellant was charged with murder, CALJIC No. 8.11 was given immediately after CALJIC No. 8.10 defining murder and the prosecutor never argued implied malice as a basis for the attempted murder conviction.

Further, even assuming for the sake of argument that the combination of instructions had the potential to be confusing, there can be no doubt that the jury found that appellant had the specific intent to kill required for attempted murder. The jury was instructed that in order to find true the allegation that an attempted murder was willful, deliberate and premeditated, the jury had to find that it was "preceded and accompanied by a clear, deliberate intent to kill." The jury found the premeditation allegation true for both attempted murders. This finding shows that the jury found that appellant acted with the requisite specific intent to kill.

8. Prosecutorial misconduct

Appellant contends that the prosecutor committed misconduct during closing argument by misstating the reasonable doubt standard and by referring to facts not in evidence.

With respect to reasonable doubt, the prosecutor argued: "So reasonable doubt at the end of the day is what makes sense. Use your common sense. That's all that it is. It's a fancy, fancy legal term for saying what makes sense to you given the facts, given the evidence. And if you step back a minute and use your common sense, look at the facts and the evidence in this case, you're going to come to one conclusion, and that is that Mr. Garrett is guilty of the crime charged in the information in this case and return verdicts of guilty. Thank you."

Appellant has forfeited this claim by failing to object and request an admonition in the trial court. (*People* v. *Brown* (2003) 31 Cal.4th 518, 553; *People* v. *Stanley* (2006) 39 Cal.4th 913, 953.) There is no reason to believe that such action would have been futile or ineffective.

Appellant contends that his failure to object and request an admonition should be excused because his claim involved a question of law based on undisputed facts. We do not agree. The purpose of the forfeiture rule is to require the parties to bring error to the trial court's attention so that the error can be corrected during trial. Appellant's excuse would eviscerate that rule.

Appellant did object to the prosecutor's statement that a witness described the shooter as a tall, skinny African American wearing a polo shirt with vertical stripes the second time the prosecutor made the statement. Appellant's counsel stated that he did not remember such a description.

The trial court agreed with appellant. It appears that witnesses did mention the polo shirt with stripes, but did not describe the shooter as tall and skinny.

A prosecutor commits misconduct when he refers to matters outside the record. (*People* v. *Cunningham* (2001) 25 Cal.4th 926, 1026.) However, "a misstatement of the evidence which is a result of inadvertence or honest mistake, is not prejudicial misconduct." (*People* v. *Panky* (1978) 82 Cal.App.3d 772, 781.)

Following appellant's objection, the court admonished the jury as follows: "Ladies and gentlemen, I'd like to remind you that what counsel is saying is not evidence. It's their recollections of what the evidence shows. And, again, if their recollection differs

from what your recollection is, you must of course go with your own recollection. Both of them will try and recall things accurately, but little errors creep in." This admonition shows that the court found the prosecutor's misstatement to be the result of inadvertence or mistake.

Following the court's admonition, the prosecutor told the jury that he was arguing from memory, that the testimony was on record and that he could be wrong. Given the court's finding and the prosecutor's acknowledgement, we see no prosecutorial misconduct. (See *People* v. *Panky, supra*, 82 Cal.App.3d at p. 781.)

We see no reason to believe that the jury disregarded the court's instruction[3] and admonition and the prosecutor's acknowledgment that he was relying on his memory, which was fallible. Accordingly, we see no prejudice to appellant from the prosecutor's argument.

9. Post-trial request for self-representation

Appellant contends that the trial court erred in denying his post-trial motion for self-representation, made on the date for sentencing.

A criminal defendant has a constitutional right under the Sixth Amendment to represent himself if he makes that choice voluntarily and intelligently. (*Faretta* v. *California* (1975) 422 U.S. 806, 818-819.) A trial court must grant a defendant's request for self-representation if, among other things, his request is unequivocal and made a reasonable time before trial. (*People* v. *Stanley, supra*, 39 Cal.4th at pp. 931-932.) A trial court has discretion to grant or deny a motion which is not made a reasonable time before trial. (*People* v. *Windham* (1977) 19 Cal.3d 121, 128.)

It is far from clear that a defendant has a federal constitutional right to self-representation after trial has begun. (See *People* v. *Mayfield* (1997) 14 Cal.4th 668, 810.) Sentencing hearings, by definition, occur after trial has begun. Assuming for the sake of

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[3] Before arguments began, the trial court instructed the jury with CALJIC No. 1.02 that statements by counsel are not evidence.

argument that such a right exists, the motion would still have to be made a reasonable time before sentencing. (*Ibid*.)

Here, a considerable time period elapsed between the verdicts in the case and the date set for the sentencing hearing. Appellant waited until the day of the hearing to make his motion. Thus, appellant's motion was not timely.

A defendant has the burden of justifying an untimely motion. (*People* v. *Marshall* (1996) 13 Cal.4th 799, 827.) The timeliness requirement serves to prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice. (*People* v. *Horton* (1995) 11 Cal.4th 1068, 1110.) A trial court may deny an untimely motion for self-representation if the court finds it is a delaying tactic. (*People* v. *Marshall* (1997) 15 Cal.4th 1, 22.)

Appellant offered no explanation of his delay in seeking self-representation. He asked for a continuance to prepare for the motions and sentencing. It would have caused some disruption to the proceedings, as the victims and next of kin of the deceased victim were present. We see no abuse of discretion in the trial court's decision to deny the motion.

10. Cumulative error

Appellant contends that the cumulative effect of errors in this case was prejudicial. We have found no cognizable error, and so reject appellant's claim.

11. Section 186.32 registration requirements

Appellant contends that a portion of section 186.32 is unconstitutionally vague and overbroad, creates the risk of arbitrary and discriminatory enforcement, violates his right to freedom of association and his rights to privacy and against self-incrimination.

Section 186.30 requires individuals convicted of an offense with a gang enhancement to register under certain circumstances. Section 186.32 sets forth the requirements for registration, including a "written statement, signed by the adult, giving

any information that may be required by the law enforcement agency . . . ." (§ 186.32, subd. (a)(2)(C).)

Appellant contends that the statute gives unfettered discretion to law enforcement in determining what information must be provided by the registrant and what non-disclosures may be punished, and that such unfettered discretion is an invitation to abuse. Appellant suggests that law enforcement officials may demand such information as the private, religious, associational and political affiliations of registrants and could arbitrarily require more disclosure from some registrants than others. The disclosure of affiliations, he contends, would chill his right to freedom of association. The disclosure of other private information would invade his right to privacy. Disclosure of other activities could violate his right against self-incrimination.

Appellant urges that we invalidate the statute but also suggests that these problems could be solved by adopting the limiting construction of the Sixth District Court of Appeal's decisions *People* v. *Bailey* (2002) 101 Cal.App.4th 238 and the follow-up case of *People* v. *Sanchez* (2003) 105 Cal.App.4th 1240 and the Fifth District's decision in *In re Jorge G.* (2004) 117 Cal.App.4th 931. Those decisions limit the information which registrants may be required to provide. We agree with those decisions.

"[T]he underlying purpose of the registration provision is to enhance law enforcement officers' ability to prevent gang-related crime by keeping informed of the location of known gang associates. 'Registration requirements generally are based on the assumption that persons convicted of certain offenses are more likely to repeat the crimes and that law enforcement's ability to prevent certain crimes and its ability to apprehend certain types of criminals will be improved if these repeat offenders' whereabouts are known.' [Citation.]" (*People* v. *Bailey, supra,* 101 Cal.App.4th at p. 245.)

We agree with our colleagues in the Sixth District Court of Appeal that section 186.32, subdivision (a)(2)(C) may be reasonably construed to require descriptive or identifying information that aids law enforcement in such monitoring similar to registration requirements of sex and narcotics offenders as well as arsonists. (*People* v. *Bailey*, *supra*, 101 Cal.App.4th at p. 245.) When so construed, the registration provision

is not unconstitutionally vague nor impermissibly overbroad and does not abridge free speech, freedom of association or privacy rights because it does not compel answers to unlimited questions. Rather, it requires only that information necessary to carry out the legitimate purposes of the Street Terrorism and Prevention Act of 1988. (*People* v. *Sanchez, supra,* 105 Cal.App.4th at p. 1246; *People* v. *Bailey, supra,* 101 Cal.App.4th at p. 245.)

The court in *Jorge G.* found that section 186.32 should be construed narrowly as in *Bailey* and *Sanchez.* Under such a construction, the court found, section 186.32 does not violate an individual's rights against self-incrimination. (*In re Jorge G., supra*, 117 Cal.App.4th at pp. 949-950.)

Having suggested in his opening brief that this Court adopt the reasoning of *Bailey, Sanchez* and *Jorge G.*, appellant complains in his reply brief that such a course of action would be improper. He contends that section 186.32 is so exceedingly vague and overbroad that the above limiting construction required to narrow the statute amounts to a substantial rewriting of it. Extensive rewriting of statutes, appellant contends, had been criticized by both the California and United States Supreme Courts. We do not agree with appellant that substantial rewriting is involved in the above construction. Further, the above construction is consistent with the purposes of the statute.

12. Consecutive terms

Appellant contends that the trial court's imposition of consecutive terms violates his rights under *Cunningham* v. *California* (2007) 549 U.S. 270 and *Blakely* v. *Washington* (2004) 542 U.S. 296. As appellant acknowledges the California Supreme Court has ruled to the contrary in *People* v. *Black* (2007) 41 Cal.4th 799. Appellant raises the issue in order to preserve it for federal review. We are bound by the decisions of the California Supreme Court and so reject appellant's claim. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County, supra,* 57 Cal.2d at p. 455.)

13. Section 12022.53 enhancements

In his opening brief, appellant contends that the trial court erred in staying rather than striking the lesser firearm enhancements under section 12022.53. After appellant filed his brief, the California Supreme Court held that such lesser enhancements must be stayed rather than stricken. (*People* v. *Gonzalez* (2008) 43 Cal.4th 1118, 1125-1131.) Accordingly, appellant's claim fails.

14. Section 186.22 gang enhancement

Appellant contends that the trial court erred in adding the 15-year minimum parole eligibility term provided by section 186.22 to the indeterminate terms for murder and the count two attempted murder, and that these terms should be stayed.

Appellant is mistaken. The trial court did not add a 15 year gang enhancement term to the term for the murder conviction. The minute order clearly states that appellant is sentenced to 50 years to life in state prison, consisting of a 25 year-to-life term for the murder conviction plus a 25 year-to-life term for the section 12022.53, subdivision (d) firearm enhancement. The court notes that section 186.22 requires that appellant serve a minimum term of 15 years before being eligible for parole. The abstract of judgment does not reflect a gang enhancement at all for the murder conviction.

The court sentenced appellant to 40 years to life for the count two attempted murder. This sentence consisted of life with the possibility of parole for the attempted murder conviction, with a minimum parole eligibility period of 15 years pursuant to section 186.22, plus a 25 year-to-life term for the section 12022.53, subdivision (d) firearm enhancement. We see no error in this sentence.

Appellant's reliance on *People* v. *Lopez* (2005) 34 Cal.4th 1002 to show error is misplaced. That case does not involve a section 12022.53 firearm enhancement. It does not discuss the interaction of section 186.22 with other enhancements at all.

Section 186.22 applies to the minimum parole eligibility period for the underlying crime, when a life sentence has been imposed for the crime. (§ 186.22, subd. (b)(5).) Section 12022.53, subdivision (d), provides that "[n]otwithstanding any other provision

of law," a person who has violated subdivision (d) shall be punished by "an *additional and consecutive term* of imprisonment in the state prison for 25 years to life." (Italics added.) We see nothing in section 186.22 or 12022.53 which requires the section 186.22 minimum parole eligibility period to be subsumed by the section 12022.53 enhancement.

15. Security fees

Respondent contends, and we agree, that the trial court erred in imposing only one security fee pursuant to section 1265.8. A $20 fine must "be imposed on every conviction for a criminal offense." (§ 1465.8, subd. (a)(1); see *People* v. *Schoeb* (2005) 132 Cal.App.4th 861, 865-866; *People* v. *Crittle* (2007) 154 Cal.App.4th 368, 370-371 [court security fee is imposed even if punishment is stayed on the conviction].) Appellant was convicted of three offenses. Two more security fees must be imposed, for an additional $40 in security fees.

Disposition

A court security fee of $20 is imposed on counts one, two, and three pursuant to section 1465.8, subdivision (a)(1), for a total of $60. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting these additional fines and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment of conviction is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J. KRIEGLER, J.